

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

RICHARD CHUDACOFF,  
Plaintiff,  
vs.  
UNIVERSITY MEDICAL CENTER, *et al.*,  
Defendants.

Case No. 2:08-cv-00863-RCJ-GWF

## ORDER

This matter is before the Court on Plaintiff's Renewed Motion for Sanctions (#630), filed on February 15, 2013; Defendants' Opposition to Renewed Motion for Sanctions (#643), filed on March 4, 2013; Plaintiff's Status Report (#650), filed on March 25, 2013; Defendants' Status Update (#651), filed on March 25, 2013; and Plaintiff's Supplement to its Status Report (#652), filed on March 27, 2013. The Court conducted a hearing in this case on April 10, 2013, during which it ordered Defendants to submit their previously produced federal income tax returns for *in camera* review by the Court. Defendants' counsel submitted the tax returns for *in camera* review on April 12, 2013.

## BACKGROUND AND DISCUSSION

This Court previously ordered Defendants Ellerton, Bernstein, Garrison and Roberts to produce copies of their 2010 and 2011 federal income tax returns, and to produce their 2012 federal income tax returns once they have been prepared. The Court also ordered Defendants to answer Plaintiff's interrogatories relating to their financial conditions, but limited the time period for the responses to January 1, 2011 to the present. The purpose of this discovery is to obtain financial information regarding Defendants' net worth for purposes of Plaintiff's claim for punitive damages.

1           The interrogatories, as limited by the Court, are as follows:

2           **Interrogatory No. 1:**

3           Please identify all bank accounts, investment accounts or other accounts with  
4           any financial institution which you have owned or been a signor between [January 1,  
2011] and the present.

5           **Interrogatory No. 2:**

6           Please identify any ownership of any businesses which you, your spouse, or  
7           any of your family trusts may have had or currently own between [January 1, 2011]  
and the present.

8           **Interrogatory No. 3:**

9           Please identify any pieces of real estate which you, your spouse, or any of  
10          your family trusts may have had or currently own between [January 1, 2011] and the  
present.

11          **Interrogatory No. 4:**

12          Please identify any assets that were purchased for more than \$10,000 which  
13          you, your spouse, or any of your family trusts may have had or currently own  
between [January 1, 2011] and the present.

14          **Interrogatory No. 5:**

15          Please state your net worth for the years ending [2011 and 2012] and describe with  
specificity how such was calculated.

16          **Interrogatory No. 6:**

17          Please identify (including name, address, and telephone number), any  
18          bookkeepers, accountants, CPA's or other financial professionals which you have  
19          engaged or have worked for you or your spouse [between January 1, 2011 and the  
present].

20          Defendants subsequently responded to each of the Interrogatory Nos. 1-5 by stating as

21          follows:

22           To the extent information sought by this Interrogatory exists, it is  
23           believed to be contained in the 2010 and 2011 IRS returns provided.

24          Defendants provided more specific answers as to where the information responsive to  
25          Interrogatory No. 6 can be found in their tax returns. Defendants submitted two sets of answers to  
26          interrogatories and amended answers to interrogatories, one set on behalf Drs. Ellerton and Roberts,  
27          and the other set on behalf of Drs. Garrison and Bernstein. Why Defendants answered in pairs is  
unclear. *See Plaintiff's Exhibit "A," Exhibits Filed Under Seal (#649).*

1 Fed.R.Civ.Pro. 33(d) states:

2 If the answer to an interrogatory may be determined by examining,  
 3 auditing, compiling, abstracting, or summarizing a party's business  
 4 records (including electronically stored information), and if the  
 burden of deriving or ascertaining the answer will be substantially the  
 same for either party, the responding party may answer by:

5 (1) specifying the records that may be reviewed, in sufficient  
 6 detail to enable the interrogating party to locate and identify  
 them as readily as the responding party could; and  
 7 (2) giving the interrogating party a reasonable opportunity to  
 8 examine and audit the records and to make copies,  
 compilations, abstracts, or summaries.

9 *Mullins v. Prudential Ins. Co. of America*, 267 F.R.D. (W.D.Ky. 2010) sets forth the  
 10 standards for interpreting and applying this rule:

11 Rule 33(d) is not intended to be used as "a procedural device for  
 12 avoiding the duty to give information." *In re Johnson*, 408 B.R. 115,  
 122 n. 3 (Bankr.S.D.Ohio 2009). In other words, "The responding  
 13 party may not avoid answers by imposing on the interrogating party a  
 mass of business records from which answers cannot be ascertained  
 14 by a person unfamiliar with them." *In re G-I Holdings, Inc.*, 218  
 F.R.D. 428, 438 (D.N.J. 2003). A party who seeks to rely upon the  
 Rule must not only certify that the answer may be found in the  
 records referenced by it, but also "must specify where in the records  
 the answers [can] be found." *Cambridge Electronics Corp. v. MGA  
 Electronics, Inc.*, 227 F.R.D. 313, 322–23 (C.D.Cal.2004) (citing  
*Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment  
 Corp.*, 711 F.2d 902, 906 (9th Cir.1983)). A party that attempts to  
 rely upon Rule 33(d) with a mere general reference to a mass of  
 documents or records has not adequately responded. *Hypertherm,  
 Inc. v. American Torch Tip Co.*, 2008 WL 5423833 at \*3  
 (D.N.H.2008). See also, *Dunkin' Donuts, Inc. v. N.A.S.T., Inc.*, 428  
 F.Supp.2d 761, 770 (N.D.Ill.2005) (reference to documents in the  
 possession of the requesting party and documents produced in this  
 case held insufficient to meet the requirements of the Rule); *In re  
 Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 320, 325–26  
 (N.D.Ill.2005) ("[T]here must be a sufficiently detailed specification  
 of the records to permit the interrogating party to find the document  
 as readily as can the party served. These are not optional  
 requirements. . . . [R]eferring to business records en masse, without  
 specifying particular documents is 'an abuse of the option.'") (citing  
*Bonds v. Dist. of Columbia*, 93 F.3d 801, 811 (D.C.Cir.1996)).

25 Defendants' answers to the interrogatories do not comply with the requirements of Rule  
 33(d) as set forth in *Mullins* and the cases cited therein. First, Defendants do not certify that the  
 27 information requested in the Interrogatories is contained in their federal income tax returns.  
 28 Defendants state only that they believe the information is contained in their tax returns. Secondly,

1 while some information responsive to the interrogatories is contained in the tax returns, there is no  
2 reasonable certainty that the tax returns contain all of the requested information. The tax returns  
3 clearly do not contain a statement of Defendants' net worth as requested by Interrogatory No. 5.  
4 Nor does information contained in the tax returns reasonably allow the Plaintiff to calculate the  
5 Defendants' net worth. Third, except for Defendants' amended answers to Interrogatory No. 6, the  
6 answers do not specify where in the tax returns the information requested in each interrogatory can  
7 be found. The Court therefore finds Defendants' answers to the Interrogatories to be insufficient  
8 and evasive.

9 Interrogatories 1-6, as modified by the Court, are reasonably straightforward and can be  
10 answered by Defendants without undue burden. The Court therefore orders each Defendant to  
11 individually serve his answers to the interrogatories and to sign them under oath. The answers shall  
12 directly and completely answer the interrogatories without reference to documents in which the  
13 responsive information may be contained. Defendants shall serve their answers within fourteen  
14 (14) days of the date of this order.

15 The Court further finds that Plaintiff is entitled to an award of expenses pursuant to Rule  
16 37(b)(2)(C) based on Defendants' and their counsel's failure to reasonably and in good faith  
17 comply with this Court's order (#615). The Court finds that an award of monetary sanctions in the  
18 form of granting Plaintiff's reasonable attorney's fees and other expenses in this matter is sufficient  
19 at this time. Given the current status of this action, Plaintiff has not been otherwise prejudiced by  
20 Defendant's and their counsel's continued dilatory conduct in providing discovery responses.  
21 Defendants and their counsel are cautioned, however, that the Court will impose more severe  
22 sanctions, if they do not provide discovery responses in compliance with this order. Accordingly,

23 **IT IS HEREBY ORDERED** that Plaintiff's Renewed Motion for Sanctions (#630) is  
24 **GRANTED** in accordance with the foregoing provisions of this order.

25 **IT IS FURTHER ORDERED** that Defendants shall serve responsive answers to  
26 interrogatories within fourteen (14) days of the filing of this order.

27 ...

28 ...

1           **IT IS FURTHER ORDERED** that Plaintiff is awarded his reasonable expenses, including  
2 reasonable attorney's fees incurred in regard to this motion.

3           1. Counsel for Plaintiff shall, no later than 14 days from entry of this order, serve and  
4 file a memorandum, supported by the affidavit of counsel, establishing the amount of attorney's  
5 fees and costs incurred in the motion addressed in this order. The memorandum shall provide a  
6 reasonable itemization and description of the work performed, identify the attorney(s) or other staff  
7 member(s) performing the work, the customary fee of the attorney(s) or staff member(s) for such  
8 work, and the experience, reputation and ability of the attorney performing the work. The  
9 attorney's affidavit shall authenticate the information contained in the memorandum, provide a  
10 statement that the bill has been reviewed and edited, and a statement that the fees and costs charged  
11 are reasonable.

12           2. Counsel for Defendants shall have 14 days from service of the memorandum of  
13 costs and attorney's fees in which to file a responsive memorandum addressing the reasonableness  
14 of the costs and fees sought, and any equitable considerations deemed appropriate for the court to  
15 consider in determining the amount of costs and fees which should be awarded.

16           3. Counsel for Plaintiff shall have 7 days from service of the responsive memorandum  
17 in which to file a reply.

18           DATED this 22nd day of April, 2013.

19  
20             
21 GEORGEFOLEY, JR.  
United States Magistrate Judge